No. 79-6740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT BULLINGTON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSOURI

BRIEF FOR THE PETITIONER, ROBERT BULLINGTON

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DOUBLE JEOPARDY CLAUSE PROHIBIT THE STATE OF MISSOURI FROM SEEKING THE DEATH PENALTY AT PETITIONER'S SECOND TRIAL AFTER THE JURY AT HIS FIRST TRIAL DECLINED TO RETURN A VERDICT OF DEATH?

II. WOULD A SENTENCE OF DEATH BE EXCESSIVE AND DISPROPORTIONATE IN THIS CASE WHEREIN A JURY DETERMINED THAT A SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PROBATION OR PAROLE FOR A MINIMUM OF FIFTY YEARS WAS THE APPROPRIATE PUNISHMENT?

III. ARE THE APPLICABLE SECTIONS OF MISSOURI REVISED STATUTES SECTION 565.012, ET SEQ. - WHICH PERMIT A JURY TO IMPOSE A DEATH SENTENCE IF: (1) THE CRIME IS FOUND TO BE "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN" OR (ii) THE DEFENDANT IS BELIEVED TO HAVE "A SUBSTANTIAL HISTORY OF SERIOUS ASSAULTIVE CRIMINAL CONVICTIONS" FACIALLY VAGUE AND OVERBROAD?

IV. IS PETITIONER'S RIGHT TO TRIAL BY JURY UNCONSTITUTIONALLY CHILLED BY PERMITTING THE STATE OF MISSOURI TO SEEK THE PENALTY OF DEATH AT PETITIONER'S RETRIAL, AFTER THE JURY AT HIS FIRST TRIAL RETURNED A SENTENCE OF LIFE IMPRISONMENT ONLY?

PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF MISSOURI

I. State of Missouri ex rel. George R. Westfall, Prosecuting Attorney of the County of St. Louis.

II. The Honorable Donald L. Mason, Judge of the Sixteenth Judicial Circuit

III. Robert Bullington, defendant in the case of State of Missouri v. Robert Bullington.

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BRIEF FOR THE PETITIONER, ROBERT BULLINGTON

JURISDICTIONAL STATEMENT

On February 11, 1980, the Supreme Court of the State of Missouri entered judgment making its rule of prohibition requested by the State of Missouri, absolute. Petitioner's timely Motion for Rehearing was denied on March 11, 1980. The Petition for Writ of Certiorari was filed on June 9, 1980, and certiorari was granted on October 6, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

On September 3, 1977, an armed intruder broke into the home of Pamela Sue Wright. After binding her mother, Mrs. Wright, and brother, John Wright, he took Ms. Wright from the house stating that he had escaped from jail and was running from the Police. (Petitioner was not an escapee from any institution.) The intruder stated that he would "drop" Ms. Wright off in a small town unharmed. After the intruder left the residence, Mrs. Wright and her son waited until they heard a car drive off and then untied themselves and ran to a neighbor's house to summon the Police.

A composite drawing was made from their description and circulated in the newspapers. As a result of an anonymous tip and records indicating that an automobile registered in Robert Bullington's wife's name and operated by him was similar to an automobile that was seen parked near the residence on the day of the kidnapping, the Police sought to question Robert Bullington.

Mrs. Wright and her son were shown a series of "mug shots" which included a photograph of the Petitioner. Mrs. Wright tentatively identified a man other than Petitioner from the "mug shots" and her son identified Bullington as the intruder. A warrant for Bullington's arrest was issued and the photograph of Petitioner appeared in the daily newspapers and on the television news.

On September 11th, 1977, Pamela Wright's body was found floating in a creek in a wooded area. The medical examiner, after ruling out other possible causes of death, determined to a reasonable medical certainty that the victim had drowned. There was no evidence of trauma, sexual abuse, or struggle. There was a "very superficial" laceration on her forehead, but it could not be determined when or how the lesion had occurred.

In October of 1977, the Petitioner was arrested in the State of California, and, after waiving extradition he was returned to Missouri.

A line-up was conducted on October 13, 1977, and Petitioner was identified by John Wright, Mrs. Wright, however, was only able to make a voice identification.

On December 9, 1977, an indictment was filed in the Circuit Court of St. Louis County, State of Missouri, charging the Petitioner with Capital Murder, Kidnapping, Armed Criminal Action, Burglarly 1st Degree and Two Counts of Flourishing a Dangerous and Deadly Weapon (J.A. 3-6). On July 7, 1978, the State of Missouri, by letter, advised counsel for Petitioner of their intent to seek the death penalty if Petitioner were convicted of capital murder, charging the following aggravating circumstances (J.A. 12, 13):

> "The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive and criminal convictions;" 565.012.2

> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;" 565.012.2(7)

The trial was commenced on October 4, 1978, and on October 11th, the jury returned its verdict of guilty on Capital Murder (J.A. 12). The next day the second stage of the bifurcated trial was commenced to consider whether Defendant should be sentenced to death or prison for fifty years without the possibility of probation or parole. The jury was instructed (J.A. 22-27) that to impose the death penalty they must find beyond a reasonable doubt that one of the two aggravating circumstances charged had been proven by the State (J.A. 23, 24) and further find beyond a reasonable doubt that any aggravating circumstances so proven was

sufficient to warrant the imposition of death (J.A. 24). They were then to determine whether those aggravating circumstances so found were outweighed by the mitigating circumstances (J.A. 24, 25) and finally find that the Petitioner should be put to death. (J.A. 25). Thereafter, evidence was introduced and the jury heard argument of counsel. The jury returned its verdict finding that Petitioner's punishment would be life imprisonment without probation or parole for a minimum of fifty years and rejected the State's case for death. (J.A. 27).

Petitioner filed a Motion for New Trial (J.A. 28-43) which was sustained by the trial court based on Petitioner's pre-trial motion to quash the jury panel (J.A. 14-16) and this Court's decision in *Duren v. State of Missouri,* 439 U.S. 357 (1979).

Before the second trial commenced, the State filed its Notice of Evidence in Aggravation citing as aggravating circumstances the identical statutory provisions they sought to prove in Petitioner's first trial and their intent to rely on the evidence and convictions previously disclosed to defense counsel before the first trial. (J.A. 45, 46). Petitioner filed his Motion to Strike Plaintiff's Notice of Evidence in Aggravation and to Exclude from Trial Evidence in Aggravation of Punishment contending that relitigation of the identical aggravating circumstances violated the Double Jeopardy Clause and chilled the Defendant's exercise of his constitutional rights (J.A. 47-49).

On March 26, 1979, the trial court indicated its intention to sustain Defendant's Motion to Strike (J.A. 52) and the State sought a Writ of Prohibition in the Missouri Court of Appeals for the Western District (J.A. 50-55). The Stop Order issued by that Court (J.A. 56, 57) was dissolved on May 30, 1979 (J.A. 58). The State sought and was granted transfer to the Supreme Court of Missouri En Banc (J.A. 59,

60) and a preliminary Writ of Prohibition was issued. On February 11, 1980, that preliminary Writ of Prohibition was made absolute (J.A. 80-100) with two Justices dissenting (J.A. 101-127). It is from this ruling that Petitioner herein seeks relief.

SUMMARY OF ARGUMENT

POINT I

From its earliest days, the concept of double jeopardy or *autrefois acquit* has protected an accused, who has been acquitted, from being retried. This protection preserves the finality of judgments, the defendant's interest in repose, and the unqualified right of the jury to determine the strengths or failings of the State's case beyond a reasonable doubt. The State of Missouri now seeks to nullify those findings because Defendant has been granted a new trial on the issue of his guilt. The trial court, pursuant to the controlling statutes, instructed the jury that death could only be imposed if the evidence proved beyond a reasonable doubt that certain specific aggravating circumstances existed; that those aggravating circumstances were sufficient to warrant the imposition of death; and that those circumstances were not outweighed by mitigating factors. Under these guidelines, the jury refused to return a verdict of death. This verdict must be afforded the same constitutional protection as has always been granted jury verdicts of acquittal, whether expressed or implied. *Green v. United States,* 355 U.S. 184, 187-188 (1957). The fact that it is the Defendant's right to life that the State wishes to relitigate further magnifies the Petitioner's compelling need for protection from the constitutional encroachments proposed by the State and approved by the Supreme Court of Missouri.

The constitutional procedures mandated for the imposition of death as well as the unquestioned qualitative desparity between it and any other sentence strongly suggests that *Stroud v. United States,* 251 U.S. 15 (1919), *North Carolina v. Pearce,* 395 U.S. 711 (1969), and *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973) should be reconsidered.

If a defendant is ever to have an interest in repose it cannot be more compelling than granting him the right to be free of the shadow of death, and if ever a jury verdict is entitled to solemnity and sanctity it is where that verdict assures to him the right to life.

POINT II

Allowing the State the opportunity to convince a second jury that Robert Bullington deserves to die will again stain the judicial system with the taint of caprice, emotion, or freakish whim condemned in *Furman v. Georgia,* 408 U.S. 238 (1972). The State has conceded that its evidence at the second trial will be identical to the evidence adduced and argued at the first, and although obviously dissatisfied with the juries' verdict of life, the State never voiced objections to the juries' composition or abilities. Considering the facts and circumstances presented in this case, if a jury were to sentence the Petitioner to death one could only conclude: (i) that said assessment was excessive in light of the jury's sentence at Petitioner's first trial; (ii) that said punishment was substantially disproportionate to the sentence he received at the first trial; or (iii) those principles expressed in *Furman* are devoid of factual application. The Supreme Court of Missouri's refusal to address Petitioner's argument and its attempt to side-step the issue only re-enforced the

Petitioner's need to be assured that there will be no arbitrary or capricious imposition of an excessive and disproportionate sentence.

POINT III

The State intends to rely on two aggravating circumstances to convince a jury at the penalty phase that Petitioner should be sentenced to death:

> "The offense was committed by a person who has a substantial history of serious assaultive criminal convictions;"
>
> "The offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind;"

Without a limiting or restrictive construction those alleged guidelines offer no actual restraint on the arbitrary and capricious infliction of the death sentence. *Godfrey v. Georgia,* ____ U.S. ____ , 64 L.Ed.2d 398 (1980). The Missouri Supreme Court's refusal to define those terms or provide the jury with specific guidelines to channel their discretion renders these provisions facially vague and overbroad, a determination the lower court felt was unnecessary based on their misinterpretation of the holdings in *Gregg v. Georgia,* 428 U.S. 153, 201 (1976).

Petitioner's jury and all other Missouri juries when considering whether death should be imposed will be obliged to create their own standards and definitions from the jumble of prejoratives that comprise these provisions.

Alabama, Arizona, California, Louisiana, Nebraska and North Carolina have all recognized the inherent vagueness and overbreadth of statutory aggravating circumstances similar to Missouri's, and have severely limited their construction and application. The Missouri Supreme

Court's refusal "to tailor. . .its law" or "to define the crimes for which death may be the sentence [promotes] 'standardless sentencing discretion,' " *Godfrey v. Georgia,* supra, 64 L.Ed.2d at 406 under two provisions that are plainly vague in construction and overbroad in application.

POINT IV

There is, at present, only one choice available to the Defendant if he wishes to avoid subjecting himself to a trial that may result in his death - waive his VI Amendment right to trial by jury. The right to a trial by jury is the most valued right defendant possesses but its value pales when the alternatives are considered. *Jackson v. United States,* 390 U.S. 570 (1968) protects the Petitioner from being compelled to choose from "Hobson's horses."

ARGUMENT

POINT I

THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE PROSECUTION FROM SEEKING THE DEATH PENALTY AT PETITIONER'S SECOND TRIAL AFTER THE JURY AT HIS FIRST TRIAL DECLINED TO RETURN A VERDICT OF DEATH.

In 1978 the State of Missouri put Robert Bullington on trial for capital murder and sought to secure a sentence of death. The State obtained a conviction, but at the penalty trial the jury rejected the State's case for death and instead returned a verdict of life imprisonment. Since the underlying conviction was obtained in violation of the Court's decision

in *Duren v. Missouri,* 439 U.S. 357 (1979), the State must now accord Mr. Bullington a new trial on the question of guilt. The issue before the Court in this case is whether the State may seize upon the occasion to subject Mr. Bullington to a second death penalty trial in the event of conviction, even though it has already tried and failed to convince an earlier jury to return a verdict of death.[1]

Plainly, the jury at Petitioner's first trial was "empowered . . . to answer 'yes' or 'no' to the question whether this defendant was fit to live." *Witherspoon v. Illinois,* 391 U.S. 510, 521 n.20 (1968). Equally plainly, it answered that question "yes." Accordingly, "much more is involved here than a simple determination of sentence." *Ibid.*

Like the Texas juries whose role at the penalty phase of a capital trial this Court has recently described, a Missouri jury "must be allowed to consider 'on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.' " *Adams v. Texas,* 48 U.S.L.W. 4869, 4871 (U.S., June 25, 1980). This consideration is not left unguided. Under Missouri law, as

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[1]Three States have held that the Double Jeopardy Clause prohibits the prosecution from forcing the accused to defend against the death penalty a second time under these circumstances. *Sanne v. State,* ____ S.W.2d ____, #63,254 (Tex. Crim. App. Sept. 10, 1980); *Commonwealth v. Littlejohn,* 443 Pa. 336, 250 A.2d 811 (1969); *People v. Henderson,* 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963) (Traynor, J.) See also *Roberson v. State,* 258 So.2d 257 (Fla. 1971). To counsel's knowledge, no state other than Missouri and no United States Court of Appeals has adopted the contrary position.

The opinion below relies upon the decision of one Court of Appeals in an analogous situation, *Gully v. Kunzman,* 592 F.2d 283 (6th Cir. 1979). However, *Gully* is not a case in which the jury actually rejected the State's case for the death penalty at a previous trial and that decision expressly rejects the inference drawn by the Missouri Supreme Court. *Id.* at 289.

required by the Constitution (see *Gregg v. Georgia,* 428 U.S. 153, 188-189, 195-196 n.47 (1976) (plurality opinion)), the jury's penalty-phase decision is "always circumscribed by. . .legislative guidelines," *id.* at 207, which "require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant," *id.* at 198. The jury's task in the penalty phase therefore requires both the determination of facts and the application of legal standards to those facts. See *Adams v. Texas, supra,* 48 U.S.L.W. at 4872.

In this context, the jury's judgment that death "is [not] the appropriate punishment in a specific case" (*Woodson v. North Carolina,* 428 U.S. 280, 305 (1976) (plurality opinion)), has all of the characteristics of an acquittal of the prosecution's charge that the defendant deserves to die. The Court "has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is expressed or implied." *Price v. Georgia,* 398 U.S. 323, 329 (1970). See also *Burks v. United States,* 437 U.S. 1, 10-11, 16 (1978); *Sanabria v. United States,* 437 U.S. 54, 75 (1978); *Fong Foo v. United States,* 369 U.S. 141, 143 (1962); *Kepner v. United States,* 195 U.S. 100, 130 (1904). As the Court declared in *Green v. United States,* 355 U.S. 184, 187-188 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . .

See also *Abney v. United States,* 431 U.S. 651, 661 (1977); *Breed v. Jones,* 421 U.S. 519, 529-530 (1975); *Serfass v. United States,* 420 U.S. 377, 388 (1975); *United States v.*

Jorn, 400 U.S. 470, 479 (1971); *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d 844, 858 (2d Cir. 1965) (Marshall, J.), *cert. denied,* 383 U.S. 913 (1966). A defendant may only be "forced to run the gauntlet once," *Green v. United States, supra,* 355 U.S. at 190, a principle which could not be more relevant than in a case where the "gauntlet" is literally a test of life or death.[2]

The Petitioner's reliance on the integrity of the jury verdict is "fundamental"[3] to the double jeopardy clause, because it is "absolute."[4] "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' " *Swisher v. Brady,* 438 U.S. 204, 214 (1978). Since the turn of the century this guarantee of finality has remained unscathed and continues to be "[t]he very foundation upon which the double jeopardy clause is based." *United States v. Ball,* 163 U.S. 662, 671 (1896) and is at the very "heart" of the Double Jeopardy Clause. *Jeffers v. United States,* 432 U.S. 137, 150 (1977) (plurality opinion).

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[2]The prohibition against retrial after acquittal is so fundamental that it may not be waived even by the failure to object or to enter a plea of *autrefois acquit. De Mino v. New York,* 404 U.S. 1305 (1972), rev'g 29 N.Y.2d 602, 273 N.E.2d 133, 324 N.Y.S.2d 402 (1972).

[3]*United States v. Martin Linen Supply Co.,* 430 U.S. 564, 571 (1977).

[4]*Burks v. United States,* 437 U.S. 1, 16 (1978). See also Westen, *The Three Forces of Double Jeopardy,* 78 Mich. L. Rev. 1000, 1004 (1980).

The reasons underlying this rule of finality[5] are none the less compelling in this case where Petitioner seeks to foreclose from the State the forbidden "second crack" at his life *Swisher v. Brady, supra,* 438 U.S. at 216 (1978).

In this case, the State "has been given one fair opportunity to offer whatever proof it could assemble," *Burks v. United States,* 437 U.S. 1, 16 (1978), in support of its quest for the death penalty. The State offered that proof at the penalty phase of the first trial, and the jury, guided by the Court's instructions (J.A. 22-27) found the evidence insufficient to justify a sentence of death. Obviously "the purposes of the [Double Jeopardy] Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.' " *Burks v. United States, supra,* 437 U.S. at 17.

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[5]Authorities have postulated various reasons for the application of such an inflexible rule as is accorded to jury verdicts of acquittal, e.g.: "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may become guilty." *Green v. United States,* 355 U.S. 184, 187-188 (1957); "Granting the government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States v. Wilson,* 420 U.S. 332, 352 (1975); it would allow "the government with [its] vastly superior resources [to] wear down the defendant so that 'even though innocent he may be found guilty.' " *United States v. Scott,* 437 U.S. 82, 91 (1978); "to protect the integrity of a final judgment" *United States v. Scott, supra,* 437 U.S. at 91; or the defendant's Sixth Amendment right to a jury trial. Westen, *The Three Faces of Double Jeopardy, supra,* 1004-1023 (1980).

It is true, of course, that the Court has declined in former years to hold that a life sentence imposed at a defendant's first capital trial barred the imposition of the death sentence at a retrial following appellate reversal of his first conviction. *Stroud v. United States,* 251 U.S. 15 (1919). It is also true that the Court has held more recently that double jeopardy does not generally forbid the imposition of a higher sentence following retrial. *North Carolina v. Pearce,* 395 U.S. 711, 719-721 (1969); *Chaffin v. Stynchcombe,* 412 U.S. 17, 24 (1973). But just as constitutional evolution and the development of a distinctly different form of state death-sentencing procedure in the wake of *Furman v. Georgia,* 408 U.S. 238 (1972), led this Court in *Gardner v. Florida,* 430 U.S. 349, 357-358 (1977) (plurality opinion), to reconsider the premises and conclusions of *Williams v. New York,* 337 U.S. 241 (1949) within the setting of these new and different death-sentencing proceedings, so the same developments require the reconsideration of *Stroud* and the distinguishing of *Pearce* and *Chaffin.*

Stroud no longer governs because it did not involve the capital sentencing proceedings of the present day, with their bifurcated trials and statutory guidelines for factfinding and judgment. *Pearce* and *Chaffin*, of course, neither involve this kind of penalty trial with its legal specification of factual issues for the jury's consideration nor were they decided under this Court's present day determination that the punishment of death is "unique in its severity and irrevocability," *Gregg v. Georgia,* 428 U.S. 153, 187 (1976) (plurality opinion).

Missouri, like all other death penalty states, today provides for a separate trial on the issue of life or death. §565.006, R.S.Mo. (1978). At this trial the jury is instructed as to a series of statutory aggravating and mitigating circumstances, designed to guide and channel its sentencing discretion. § §565.012.2 and 565.012.3 R.S.Mo. (1978).

The jury can not impose the death penalty unless it finds at least one aggravating circumstance beyond a reasonable doubt, specifies in writing the aggravating circumstance or circumstances found, and determines that any mitigating circumstances which may exist do not outweigh the aggravating circumstance or circumstances. § § 565.012.1, 565.012.4, and 565.012.5, R.S.Mo. (1978).

This statutory procedure is a far cry from routine jury sentencing, where "[n]ormally, there would be no way for a jury to place on the record the reasons for its collective determination, and ordinarily the resentencing jury would not be informed of any conduct of the accused unless relevant to the question of guilt." *Chaffin v. Stynchcombe, supra,* 412 U.S. at 28, n.15 (1973). Here, there is a separate trial proceeding at which the jury must make specific findings, pursuant to statutory standards, if death is to be imposed. Where the State has been unable at such a proceeding to secure the death penalty, the jury's determination is functionally equivalent to an acquittal for purposes of double jeopardy analysis: "[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United*

States, supra, 437 U.S. at 11 (1978).[6] The State has had one chance to convince a jury that Petitioner should be executed, and has "failed to prove its case" for a verdict of death. *Burks v. United States, supra,* 437 U.S. at 15.[7]

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[6]Here, the State does not even claim that it has any new evidence to muster at a second penalty trial. Indeed, it conceded three times at oral argument in the court below that it would present precisely the same evidence adduced at the previous trial at which the jury declined to return a verdict of death. (J.A. 62, 69); 594 S.W.ed at 922, 925, 926 (Seiler, J. dissenting). However, even if the State were to claim that it has found new evidence, it would not be entitled to subject Petitioner to a second death penalty trial. "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." *Burks v. United States, supra,* 437 U.S. at 11, n.6.

Even if the Double Jeopardy Clause were not applicable here, the State's concession that it would present precisely the same evidence at a second penalty trial would be controlling were the Court to apply the Due Process principles of *North Carolina v. Pearce, supra,* 395 U.S. at 723-26 (1969). For the reasons stated above, we submit that *Pearce* at least should be applicable to jury sentencing under Missouri's death penalty statute, notwithstanding the Court's decision in *Chaffin* that *Pearce* does not apply to jury sentencing in general. However, because the Double Jeopardy Clause is so manifestly applicable here, the Court need not reach that question.

[7]Under the death-sentencing statutes in force prior to *Furman v. Georgia,* 408 U.S. 238 (1972), the jury would typically render a verdict of guilty with or without mercy after a single trial, and the Double Jeopardy issue would turn upon whether a verdict specifying mercy constitutes a "lesser included offense" of a verdict of death and implies an acquittal as to death under *Green v. United States, supra.* See *Commonwealth v. Littlejohn, supra,* 433 Pa. 336, 250 A.2d 811 (1969); *People v. Henderson, supra,* 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963). Here, however, there is nothing "implied" about the jury's action at Petitioner's first trial. At a separate penalty hearing conducted under Missouri's statutory death-sentencing standards, the jury rejected outright the prosecution's case for a verdict of death. See *Sanne v. State, supra* (1980).

The majority below engaged in considerable speculation as to the precise ground for the jury's action at the first trial, contending that it is the legislature's role to determine lesser included offenses, 594 S.W.2d

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In this setting, there can be no doubt of the full applicability of the purposes underlying the time-honored "universal maxim. . .that no man is to be brought into jeopardy of his life, more than once, for the same offense," 4 BLACKSTONE, COMMENTARIES *335, quoted in *Crist v. Bretz,* 437 U.S. 28, 33 n.8 (1978). Permitting the prosecution to attempt for a second time to make its once-failed case for the defendant's death would affront "a primary purpose served by [the]. . . rule [against double jeopardy, which] is akin to that served by the doctrines of *res judicata* and collateral estoppel — to preserve the finality of judgments." *Id.* at 33; see also *United States v. Scott,* 437 U.S. 82, 92 (1978). And "[t]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that [even though deserving of life, he may not

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at 912, 913 (J.A. 85) and apparently rejected its earlier holdings defining a lesser included offense (i.e., "If the greater of two offenses includes all the legal and factual elements of the lesser. . . ." *State v. Amsden,* 299 S.W.2d 498, 504 (Mo. 1957)) and the requirement that the courts are responsible for determining what constitutes a lesser included offense. *State v. Stone,* 571 S.W.2d 486 (Mo. App. 1978); *State v. Fleming,* 528 S.W.2d 513 (Mo. App. 1975); Rule 28.02(e), (f) V.A.M.R. However, even under this Court's "implied acquittal" cases, it is of absolutely no consequence whether the jury at Petitioner's first trial rendered its verdict of life imprisonment because it (i) believed that no aggravating circumstance had been proved beyond a reasonable doubt or (ii) believed that there was mitigating circumstance or circumstances that outweighed the evidence in aggravation. Regardless of the basis for the jury's reasoning, it " 'was given a full opportunity to return a verdict' " of death, yet declined to do so. *Price v. Georgia, supra,* 398 U.S. at 329 (quoting *Green v. United States, supra,* 355 U.S. at 191). See also *United States ex rel. Hetenyi v. Wilkins, supra,* 348 F.2d at 856-857 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

be able to demonstrate it]," *id.* at 91. Finally, the "ordeal" of a second trial, after the prosecution has once tried and failed to make its case, see *Green v. United States,* 335 U.S. 184, 187 (1957), is magnified immeasurably when the two trials are for the defendant's life.

The issues decided in *Pearce* and *Chaffin* simply did not present the Court with the enormities of forcing a capital defendant to stand trial for his life a second time after having convinced the jury beyond a reasonable doubt at this previous sentencing trial to reject the State's case for the death penalty. For both *Pearce* and *Chaffin* the increased sentences received at their second trial meant additional years in prison but

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than 100-year prison term differs from one of only a year or two.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). As the Court recognized in *Gardner v. Florida,* 430 U.S. 349, 357-58 (1977) (plurality opinion):

> From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.[8]

Indeed, since *Furman* the Court has consistently and continually echoed its findings that " 'the penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. . . . [A]nd it is unique finally in its absolute renunciation of all that is embodied in our concept of humanity.' Id., at 306.

[8]See also *Lockett v. Ohio,* 438 U.S. 586, 604 (1978); *Beck v. Alabama,* ____ U.S. ____ , 65 L.Ed.2d 392, 403 & n.13 (1980).

(Stewart, J. concurring). This theme, the unique nature of the death penalty... has been repeated time and time again in our opinions." *Rummell v. Estelle,* 445 U.S. 263, 272 (1980). Obviously, being compelled to defend against the death penalty a second time subjects the defendant to a unique degree of "personal strain, public embarrassment, and expense,"[9] of "heavy pressures and burdens — psychological, physical and financial,"[10] of "embarrassment, expense and ordeal...compelling him to live in a continuing state of anxiety and insecurity...."[11] Where the defendant has already persuaded the jury at an earlier sentencing trial to return a verdict against death, forcing him to endure a second capital trial is nothing short of monstrous:

> Such a prosecution... [is] cruel and inhuman, imposing on the accused a "hardship so acute and shocking that our policy will not endure it." (*Palko v. State of Connecticut,* 302 U.S. 328, 58 S.Ct. 149, 153, 82 L.Ed. 288)....

United States ex rel. Hetenyi v. Wilkins, supra, 348 F.2d at 857 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

The State of Missouri has had its chance to kill Robert Bullington, and has failed to convince a jury that he should be put to death. Under the Double Jeopardy Clause, it should not be permitted to subject him to a second death penalty trial.

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[9]*Abney v. United States, supra,* 431 U.S. at 661 (1977).

[10]*Breed v. Jones, supra,* 421 U.S. at 530 (1975).

[11]*Green v. United States, supra,* 355 U.S. at 187-188 (1957).

POINT II

A SENTENCE OF DEATH WOULD BE EXCESSIVE AND DISPROPORTIONATE IN THIS CASE.

In order to pass constitutional muster, a punishment may not be excessive or disproportionate. *Robinson v. California,* 370 U.S. 660 (1962); *Trop v. Dulles,* 356 U.S. 86 (1958); *Weems v. United States,* 217 U.S. 349 (1910). While the Court has held that a sentence of death for the offense of intentional homicide is not *per se* excessive or disporportionate, *Gregg v. Georgia, supra,* 428 U.S. at 187, it has also recognized that a decision that death is the appropriate punishment in a particular case must be an individualized determination based on the character of the specific offender and the circumstances of the particular offense. See *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976) and *Roberts v. Louisiana,* 428 U.S. 325, 33 (1976). For one jury to sentence Petitioner to death after a prior jury has determined on the same evidence that life without the possibility of parole for fifty years is a sufficient "expression of society's moral outrage," *Gregg v. Georgia, supra,* 428 U.S. at 183, would be to impose a sentence that is both excessive and disproportionate. Moreover, to force Petitioner through the trauma of another capital trial and expose him to the possibility of an arbitrary and capricious result would be nothing short of cruel.

A. DISPROPORTIONALITY

When this Court in 1976 approved the Georgia, Florida and Texas capital-sentencing statutes on their face, *Gregg v.*

Georgia, supra; Proffitt v. Florida, 428 U.S. 242 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976), it did so on the assumption that the statute at issue, as interpreted by the highest courts of the states, would guarantee against the arbitrary and capricious infliction of the death penalty which had been condemned in *Furman v. Georgia,* 408 U.S. 238 (1972). The Court placed particular reliance on the procedures for appellate review, *Gregg v. Georgia, supra,* 428 U.S. at 166-68, 204-06 (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 222-24 (White and Rehnquist, JJ. and Burger, CJ., concurring), viewing it as an effective means by which the state would insure that the death penalty would be applied in a fair, rational, consistent and evenhanded manner, *Proffitt v. Florida, supra,* 428 U.S. at 259-60; *Jurek v. Texas, supra,* 428 U.S. at 276; see also *Gardner v. Florida,* 430 U.S. 349, 361 (1977), so that similar cases would reach similar results, *Gregg v. Georgia, supra,* 428 U.S. at 198, 208 (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 223 (White, J. concurring); *Proffitt v. Florida, supra,* 428 U.S. at 251, 253, 258 (opinion of Stewart, Powell and Stevens, JJ.); *Jurek v. Texas, supra,* 428 U.S. at 270, (opinion of Stewart, Powell and Stevens, JJ.); *id.* at 279 (White and Rehnquist, JJ., and Burger, CJ., concurring) and there would be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Gregg v. Georgia, supra,* 428 U.S. at 198, quoting *Furman v. Georgia, supra,* 408 U.S. at 313 (White, J. concurring).

Although, ordinarily there might be some debate as to whether two capital cases are sufficiently similar to compel a similar result in each, if Petitioner is retried and sentenced to death there unquestionably is a case "on all fours" to which his capital case should be compared—his own case on the first trial. Since the prosecutor has repeatedly represented to the courts below that he has no additional evidence to

present on retrial, (J.A. 62,69) the two cases are more than similar, they are for all practical purposes identical.[12] Where the same defendant is being tried under the identical statutes for the identical offense on the identical set of facts, there is no "principled way to distinguish" the two cases, *Godfrey v. Georgia, supra,* 64 L.Ed.2d at 409, and a sentence of death is *a fortiori* disproportional and unconstitutional. To say otherwise would be to concede that the Missouri death sentencing system is no more than a "senseless lottery," *Furman v. Georgia, supra,* 408 U.S. at 277 (Brennan, J., concurring), and would mean that the Eighth Amendment "[r]ights declared in words [would] be lost in reality." *Weems v. United States,* 217 U.S. 349, 373 (1910).[13]

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[12]Even if this admission had not been made by the State, the two aggravating circumstances on which notice was given for the retrial (J.A. 45) are the same as those presented at the first trial. (J.A. 12) While decidely vague (see supra pp. 21), these aggravating circumstances by their nature involve facts about the defendant and the circumstances of the offense that could not and in fact have not changed since the first trial. Furthermore, the Supreme Court of Missouri's attempt to distinguish this case from *Ward v. State,* 239 S.E.2d 365 (1977), in which the Supreme Court of Georgia adopted the position now urged by Petitioner, on the ground that the evidence at Petitioner's second trial may differ from that presented in the first, ignores the fact that the evidence in Ward's second trial was not precisely the same as in the first. As the dissent makes clear in *Ward,* additional information concerning the defendant's guilt was introduced at the retrial; the Georgia court, nonetheless found a subsequent sentence of death to be disproportionate to the life sentence imposed at Ward's first trial.

[13]The Supreme Court of Missouri posited that since Petitioner's life sentence at the first trial might be the act of an "aberrant" jury, 594 S.W.2d at 917, (J.A. 96), the verdict should not prevent the state from obtaining a death sentence on the same evidence on retrial. While it is, of course, possible that the jury verdict was not based in reason, it is constitutionally unacceptable to assume that such was the case, to Petitioner's prejudice. It is, rather, to be assumed that jurors behave as reasonable people. Further, Missouri's decision in formulating its

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B. EXCESSIVENESS

Because the death penalty is different from any sentence of imprisonment, no matter how long, in both its severity and finality, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina, supra,* 428 U.S. at 305. *Cf. Beck v. Alabama,* ____ U.S. ____ , 65 L.Ed.2d 392 (1980).

This court has cited with approval the rule that a jury recommendation of life should be followed unless "the facts supporting the sentence of death are so clear and convincing that no reasonable person could differ." *Proffitt v. Florida, supra,* 428 U.S. at 249, citing *Tedder v. State,* 322 So.2d 908, 910 (1975). The rule has its basis in the "fundamental respect for humanity underlying the Eighth Amendment" *Woodson v. North Carolina, supra,* 428 U.S. at 304 and reflects an understanding that once representatives of the community have decided that neither the interests of retribution nor of deterrence require more than the sentence of life in a particular case, it cannot be said with confidence that, to the contrary, "death is the appropriate punishment." *Id.* at 305. If it has been determined, as it was in Petitioner's case, that life without the possibility of parole for fifty years is a sufficient punishment, then the imposition of the incomparably more harsh and painful punishment of death would be no more than the "gratuitous infliction of suffering." *Gregg v. Georgia, supra,* 428 U.S. at 183 (opinion

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legislation *not* to require findings by the jury in cases in which life is imposed cannot now be used as a weapon against Petitioner. This is particularly true in light of this Court's insistence that in death cases all doubts about a particular finding be resolved in favor of the accused. *Andres v. United States,* 333 U.S. 746 (1948).

of Stewart, Powell and Stevens, JJ.) To impose death on Petitioner where life has been deemed the "appropriate punishment" would be to impose an unconstitutionally excessive punishment.

The Court has made clear that "[i]t is of vital importance to the defendant and the community that any decision to impose death be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 358 (1977). No defendant who has run the gauntlet of a capital trial and escaped with his life could believe in the fairness, justness or rationality of a subsequent determination to sentence him to death at a retrial in which no additional evidence was produced. Nor could the community be confident that its system of justice was functioning without the taint of caprice, emotion or freakish whim. Having once weathered the perils of a capital trial, a defendant should not be forced back into the storm a second time to see whether he might this time be "struck by lighting." *Furman v. Georgia,* 408 U.S. 238, 309 (1972) (Stewart, J. concurring).

POINT III

THE APPLICABLE SECTIONS OF MISSOURI REVISED STATUTES § 565.012, ET SEQ. - WHICH PERMIT A JURY TO IMPOSE A DEATH SENTENCE IF: (i) THE CRIME IS FOUND TO BE "OUTRAGEOUSLY OR WANTONLY VILE, HORRIBLE OR INHUMAN" OR (ii) THE DEFENDANT IS BELIEVED TO HAVE "A SUBSTANTIAL HISTORY OF SERIOUS ASSAULTIVE CRIMINAL CONVICTIONS" ARE FACIALLY VAGUE AND OVERBROAD.

The Supreme Court of Missouri, by refusing to clarify or limit the construction and application to be given to § 565.012.2(7) and by misapplying this Court's holding in *Gregg v. Georgia,* 428 U.S. 153 (1976), has obviated that decision's constitutional mandate that the sentencer's discretion, in capital cases, be "directed" and "limited."

This Court on three occasions has examined statutory aggravating circumstances adopted by different states in response to the Court's requirement "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia, supra,* 428 U.S. at 189 (plurality opinion of Stewart, Powell and Stevens, JJ.).

In *Gregg v. Georgia,* the court reviewed in passing[14] a

[14]The court expressly noted that "[i]n light of the limited grant of certiorari," it would "review the 'vagueness' and 'overbreadth' of the statutory aggravating circumstances only to consider whether their imprecision renders this capital-sentencing system invalid under the Eighth and Fourteenth Amendments." *Gregg v. Georgia, supra,* 428 U.S. at 201 n.51.

Georgia statutory aggravating circumstance quite similar to subsection .2(7) of the Missouri capital statute, which identifies as aggravated those murders characterized by, "torture, depravity of mind or an aggravated battery."[15] Noting that "[i]t is. . .arguable that any murder involves depravity of mind or an aggravated battery," *Gregg v. Georgia, supra,* 428 U.S. at 201, the Court nevertheless found that the only case in which the Georgia Supreme Court had in fact upheld a death sentence based solely on this aggravating circumstance was a "horrifying torture-murder," *Id.* In that light, the Court concluded that "there is no reason to assume that the Supreme Court of Georgia will adopt an open-ended construction," *id.,* in violation of the Eighth and Fourteenth Amendments.

The Court's second review of aggravating circumstances came in *Proffitt v. Florida,* 428 U.S. 242 (1976), in which a

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[15]Under Ga. Code Ann. §27-2534.1(b)(7)

> "the judge shall consider, or he shall include in his instructions to the jury for it to consider. . .any of the following statutory aggravating circumstances which may be supported by the evidence:
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> * * *
>
> (7) The offense. . .was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Missouri Rev. Stat. §565.012.2(7) reads:

> "Statutory aggravating circumstances shall be limited to the following:
>
> * * *
>
> (7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."

Thus, the Missouri statute differs chiefly from its Georgia counterpart by the absence of any specification of "aggravated battery" as a quantitative consideration guiding the jury's use of the circumstance.

vagueness and overbreadth challenge was asserted aginst Florida's equivalent aggravating circumstance.[16] The Court in *Proffitt,* guided by the principle that this "provisio[n][17] must be considered as [it has] been construed by the Supreme Court of Florida," *Proffitt v. Florida, supra,* 428 U.S. at 255, observed that Florida by judicial construction had in fact limited the circumstance to " 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Id.* The Court declined to "say that the provision, as so construed, provides inadequate guidance," *id.* at 256, under Eighth Amendment standards.

The Court's third encounter with a statutory aggravating circumstance in a capital case came in the last Term, in *Godfrey v. Georgia,* ____ U.S. ____ , 64 L.Ed.2d 398 (1980), in which the petitioner challenged the application to his case of the same aggravating circumstance reviewed briefly in *Gregg,* a circumstance almost identical to the statutory provision before the court in the present case.

The Court in *Godfrey* acknowledged that

> "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.' "

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[16]Under Fla. Stat. Ann. §921.141(5)(h)

"Aggravating circumstances shall be limited to the following:

* * *

(h) The capital felony was especially heinous, atrocious, or cruel."

[17]Another statutory aggravating circumstance Fla. Stat. Ann. §921.141(5)(c), which is not relevant for present purposes, was also under challenge in *Proffitt.*

Godfrey v. Georgia, supra, 64 L.Ed.2d at 406. The Court thereby recognized that in the absence of something more to guide the jury than the opaque language of (b)(7) the statute could not stand. Although the court found that narrowing criteria "had been laid out by [the Georgia Supreme Court] in the *Harris* [*v. State,* 237 Ga. 718, 230 S.Ed.2d 1 (1976)] and *Blake* [*v. State,* 239 Ga. 392, 236 S.Ed.2d 637 (1977)] cases," it concluded that the Georgia Supreme Court had not applied its own restrictive construction of (b)(7) in Godfrey's case and therefore vacated his death sentence. (Notably the crucial limiting criteria in the *Blake* and *Harris* cases, which alone save the Georgia statute as construed, rely heavily upon the final phrase of (b)(7) - "aggravated battery to the victim." That phrase is altogether absent from the Missouri statute in issue here.)

Similar narrowing and limiting constructions have characterized the approach of other state courts. For example, the State of Alabama in *Jacobs v. State,* 361 So.2d 607, 633 (Ala. Crim. App. 1977), *aff'd*, 361 So.2d 640 (1978); the State of Nebraska, in *State v. Rust,* 197 Neb. 528, ____ ,250 N.W.2d 867, 881 (1977); and the State of North Carolina, in *State v. Goodman,* ____ N.C. ____, ____, 257 S.E.2d 569, 585 (1979) have all adopted constructions limiting their equivalent statutory aggravating circumstances to "conscienceless or pitiless crime[s] which [are] unnecessarily torturous to the victim." The State of Virginia and the State of Arizona have engaged in similar attempts to limit the sweep of their statutes. *Smith v. Commonwealth,* ____ Va. ____ , 248 S.E.2d 135, 149 (1978) and *State v. Madsen,* 609 P.2d 1046 (1980). The Missouri Supreme Court's refusal to limit or direct the construction to be given subsection .2(7) allows a jury to again speculate as to the meaning and construction to be given to that phrase without guidance from the Court.

The Louisiana Supreme Court, faced with the inclusion of equivalent language as a circumstance of the substantive criminal offense of capital murder under a prior statute[18] went further than its sister states, holding that "the potential for abuse in making heinousness, atrociousness, or cruelty an element of the offense is both readily apparent and virtually unlimited. . . .[T]hese terms are too vague to serve as constitutionally adequate elements. . . [and therefore] offen[d] the state constitutional guarantees of due process and fair trial." *State v. Payton,* ____ La. ____ , 361 So.2d 866, 871 (1978); see also *State v. Culberth,* No. 66728 (La. Sup. Ct., Nov. 10, 1980). The First Appellate District Court of Appeals of California has reached a similar conclusion concerning a California statutory "special circumstance" which appears plainly to have incorporated into its statutory language the limiting construction placed by the Florida Supreme Court on its similar statute.[19] *People v. Superior Court,* 105 Cal. App.3d 365, 164 Cal. Rptr. 210 (Cal. Ct. App. 1st Dist.) vacated and remanded sub. nom. *Calif. v. Superior Ct.,* ____ U.S. ____ , 49 U.S.L.W. 331 (U.S., Nov. 4, 1980).

In sum, both this Court and the appellate courts of a significant number of states have recognized the inherent

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[18]Under La. Rev. Stat. 14:30.1(B), enacted in 1977, a murder committed with intent but without any aggravating circumstances constituted second degree, or noncapital murder. See *State v. Payton,* ____ La. ____ , 361 So.2d 866, 869-71 (1978).

[19]Under Cal. Penal Code § 190.2(a)(14) the jury may consider as a special circumstance that

> "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless or pitiless crime which is unnecessarily torturous to the victim."

vagueness and overbreadth of statutory aggravating circumstances such as Missouri's subsection .2(7) unless those statutes have been carefully limited by judicial construction. The Missouri Supreme Court, however, expressly declined either "to tailor. . .its law" or "to define the crimes for which death may be the sentence in a way that obviates 'standardless sentencing discretion.' " *Godfrey v. Georgia, supra,* 64 L.Ed.2d at 406. Instead, the Missouri Supreme Court erroneously concluded from this Court's discussion in *Gregg* that its own statutory aggravating circumstance is not "so wanting in precision that it rendered the capital sentencing procedure capable of arbitrary and capricious decision." *Westfall v. Mason, supra,* at 917 (J.A. 94-95) and has confidently asserted:

> We see no reason to find that our almost identical statutory provision violates the fourteenth amendment particularly when the statute and its application is subject to mandatoty review by the Missouri Supreme Court in all capital cases. *Id.*

The Missouri court's reliance upon its appellate authority to correct misapplication of subsection .2(7) is beside the point, however, for this Court clearly insisted in *Godfrey,* that it is "the sentencer's discretion" that must be channeled "by 'clear and objective standards' that provide 'specific and detailed guidance' " to the trial jury. *Godfrey v. Georgia, supra,* 64 L.Ed.2d at 406. The inherent constitutional deficiencies of subsection .2(7) are not remedied by the Missouri Supreme Court's promise of corrective appellate intervention, if, as seems certain, Missouri trial juries impose arbitrary death sentences under this subsection because of the absence of legislative or judicial guidance.

This Court has consistently condemned statutes which "licens[e] the jury to create its own standard in each case." *Herndon v. Lowry,* 301 U.S. 242, 263 (1937); *e.g., United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921);

Lanzetta v. New Jersey, 306 U.S. 451 (1939); *Cox v. Louisiana,* 379 U.S. 559 (1965); *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971); *Papachristou v. City of Jacksonville,* 405 U.S. 159 (1972); *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973); *Smith v. Goguen,* 415 U.S. 566 (1974). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminating application." *Grayned v. City of Rockford, supra,* 408 U.S. at 108-09. It is that very danger, intensified in a capital case because of the Eighth Amendment's proscription against arbitrary capital sentences, which the Missouri statute requires Petitioner and other capital defendants to endure.

Moreover, the State's attempted application of subsection .2(7) to the facts of this case is sufficient to demonstrate that, without legislative or judicial guidance, the aggravating circumstance will inevitably be abused. The victim in this case was found in a wooded creek several days after she had been kidnapped. Others who had been present in the victim's home at the time of the kidnapping were left unharmed. The only evidence of physical trauma to the victim was a slight superficial cut on her forehead. There was no evidence of rape, molestation, debasement, abuse or torture. The medical examiner testified that the cause of death, to a reasonable medical certainty, was drowning.

Any such limited construction or guidelines for the jury were denied to the Petitioner in his trial because trial court in its instruction (J.A. 23) omitted any reference to torture leaving the jury with a jumble of "synonyms of equal or

greater uncertainty."[20] See *People v. Superior Court, supra.*[21] Without question, requiring a jury to find that the offense "involved torture" clarifies and enlightens the construction to be given to the phrase "depravity of mind." These phrases, while not identical in meaning, can and should be construed to be identical in degree.

To apply subsection .2(7) to the facts of this tragic but unextraordinary crime is to transform Missouri's statutory aggravating circumstance into an *omnium gatherum,* a circus tent which will cover any murder and which seeks to drag the law back to where it was before *Furman v. Georgia.* Both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment prohibit that result and require

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[20]We append a small glossary of the statutory terms as defined in Webster's New Collegiate Dictionary, B. & C. Merriam Co., 1961.

Outrage: (1) Extravagant or violent misdoing; wrong done to persons or things.

Wanton: (1) Orig., undisciplined; unruly. (4) Marked by arrogant recklessness of justice, of the feelings of others, or the like.

Vile: (2) Morally base, wicked, sinful—(4) Loosely, objectionable for any reason; bad; as vile weather.

Horrible: Exciting, or tending to excite, horror; dreadful; shocking.

Horror: A painful emotion of fear, dread and abhorrence; great aversion and repugnance.

Inhuman: (1) Destitute of human or humane feeling; cruel; brutish. (2) Unlike what is normally human; nonhuman.

Humane: (1) Having feelings and inclinations creditable to man; kind; benevolent.

Depravity: (1) State of being depraved; corruption.

Depraved: Characterized by corruption; esp. perverted, evil.

Corruption: (1) A corrupting, or state of being corrupt; as (a) Decay (b) Depravity; impurity (c) Bribery.

Corrupt: (2) Changed from a state of uprightness, correctness, truth, etc., to a bad state; depraved.

[21]On June 26, 1980 by Per Curiam order the Supreme Court of California denied the Attorney General's Petition for Review.

the Court to declare Missouri Rev. Stat. §5.3.012.2(7) vague and overbroad on its face.

Petitioner also challenges on its face subsection .2(1) of Mo. Rev. Stat. §565.012, which makes it an aggravating circumstance if "[t]he offense was committed. . .by a person who has a substantial history of serious assaultive criminal convictions." This subsection is virtually identical to Ga. Code Ann. §27-2534.1(b)(1)[22] which, as the Court noted in *Gregg,* had been held "impermissibly vague in *Arnold v. State,* 236 Ga. 534, 540, 224 S.Ed.2d 386, 391 (1976), because it did not provide the jury with 'sufficiently "clear and objective standards." ' " *Gregg v. Georgia, supra,* 428 U.S. at 202.

The imprecision of these guidelines becomes apparent when they are viewed in light of the evidence to substantiate this instruction received by the jury at the penalty phase of Petitioner's first trial. The jury was advised of two thirteen year old convictions: kidnapping and armed robbery. No other instruction was given to the jury and it was left to it, in its unguided discretion, to define what constituted a "substantial history" and what a "serious assaultive criminal conviction" was. Clearly, if the legislature had intended that two convictions would amount to a "substantial history" they could have said so using phraseology such as "The defendant has been conficted of more than one serious assaultive crime."

Although this point was raised, (J.A. 72) the Missouri Supreme Court did not address this contention in its opinion,

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[22]Ga. Code Ann. §27-2534.1(b)(1) reads in relevant part as follows:

(1). . .the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

and therefore, it obviously has set no judicial limit on the reach of that aggravating circumstance. Under such circumstances, the Eighth and Fourteenth Amendment considerations which invalidate subsection .2(7) suffice to render subsection .2(1) facially unconstitutional as well.

POINT IV

PERMITTING THE STATE OF MISSOURI TO SEEK THE PENALTY OF DEATH AT PETITIONER'S RETRIAL, AFTER THE JURY AT HIS FIRST TRIAL RETURNED A SENTENCE OF LIFE IMPRISONMENT ONLY, UNCONSTITUTIONALLY CHILLS THE EXERCISE OF HIS RIGHT TO TRIAL BY JURY AT THE SECOND TRIAL

If the State of Missouri is permitted to seek the death penalty at Petitioner's second trial, he will have the option of avoiding a death sentencing by waiving his Sixth Amendment right to a trial by jury. Under this Court's decision in *North Carolina v. Pearce,* 395 U.S. 711, 726 (1969), a *judge* is flatly prohibited from imposing a sentence more severe than the one meted out at the first trial, unless there are reasons for a higher sentence "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding." As noted earlier, the State has never contended that such reasons are present in this case. (J.A. 62, 69).

Missouri law permits judicial capital sentencing in "cases tried before a judge." Section 565.006.2 R.S.Mo. (1978). Hence, to come within the doctrine of *Pearce* Petitioner must waive his right to a jury not only at the sentencing phase but also at the guilt trial. Under *Jackson v. United States,* 390 U.S. 570 (1968), the state may not constitutionally subject Petitioner to such a choice.

We recognize in a footnote of *Chaffin v. Stynchcombe,* 412 U.S. 17, 33 n.21 (1973), this Court appeared to reject a contention analogous to the one set forth above.[23] However, the court in *Chaffin* noted that it is usually open to "considerable speculation" whether even under *Pearce* the judge "may or may not give a sentence as high as the jury might have." *Ibid.* Here, there is no room for such speculation; the State's concession "peculiarly insur[es] that. . . [if petitioner] waive[s] a jury in favor of a bench trial, . . .[he cannot] be sentenced to death. . ." *Lockett v. Ohio,* 438 U.S. 586, 618 (1978) (concurring opinion of Blackmun, J.). Furthermore, *Chaffin* was not a case of a defendant actually sentenced to death by a jury under circumstances where the judge could have imposed no greater sentence than life imprisonment. In this case, Petitioner faces precisely that predicament. If he forfeits his Sixth Amendment right to a jury upon re-trial, he "absolutely precludes imposition of the death penalty." *Lockett v. Ohio, supra,* 438 U.S. at 618 (concurring opinion of Blackmun, J.). *Jackson* clearly prohibits such a result. See *Corbitt v. New Jersey,* 439 U.S. 212, 217 (1978) (rationale of Jackson applies where waiver of a constitutional right "avoids any possibility of the death penalty's being imposed").

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[23]The argument was not, however, developed in the briefs in *Chaffin* and counsel for Chaffin merely "touched on it briefly" in argument before this Court. *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Missouri should be reversed.

Respectfully submitted,

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APPENDIX

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal procecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, when district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies

thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

REVISED STATUTES OF MISSOURI, 1978

565.001. Capital murder defined.-Any person who unlawfully, willfully, knowingly, deliberately, and with premeditation kills or causes the killing of another human being is guilty of the offense of capital murder.

565.006. Verdict as to guilt when rendered-finding of guilt, effect of-presentence hearing, admissible evidence-penalty, when imposed-reversible error, effect of .-1. At the conclusion of all trials upon an indictment or information for capital murder heard by a jury, and after argument of counsel and proper charge from the court, the jury shall retire to consider consideration of punishment, and by their verdict ascertain, whether the defendant is guilty of capital murder, murder in the first degree, murder in the second degree, manslaughter, or is not guilty of any offense. In nonjury capital murder cases, the court shall likewise first consider a finding of guilty or not guilty without any consideration of punishment, and by its verdict ascertain, whether the

defendant is guilty of capital murder, murder in the first degree, murder in thesecond degree, manslaughter, or is not guilty of any offense.

2. Where the jury or judge returns a verdict or finding of guilty as provided in subsection 1 of this section, the court shall resume the trial and conduct a presentence hearing before the jury or judge at which time the only issue shall be the determination of the punishment to be imposed. In such hearing, subject to the laws of evidence, the jury or judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions and pleas. Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible. The jury or judge shall also hear argument by the defendant or his counsel and the prosecuting attorney regarding the punishment to be imposed. The prosecuting attorney shall open and the defendant shall conclude the argument to the jury or judge. Upon conclusion of the evidence and arguments, the judge shall give the jury appropriate instructions and the jury shall retire to determine the punishment to be imposed. In capital murder cases in which the death penalty may be imposed by a jury or judge sitting without a jury, the additional procedure provided in section 565.012 shall be followed. The jury, or the judge in cases tried by a judge, shall fix a sentence within the limits prescribed by law. The judge shall impose the sentence fixed by the jury or judge. If the jury cannot, within a reasonable time, agree to the punishment, the judge shall impose sentence within the limits of the law; except that, the judge shall in no instance impose the death penalty when, in cases tried by a jury, the jury cannot agree upon the punishment.

3. If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

565.012. Evidence to be considered in assessing punishment in capital murder cases.-1. In all cases of capital murder for which the death penalty is authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider:

(1) Any of the statutory aggravating circumstances enumerated in subsection 2 which may be supported by the evidence.

(2) Any of the statutory mitigating circumstances enumerated in subsection 3 which may be supported by the evidence.

(3) Any mitigating or aggravating circumstances otherwise authorized by law, and

(4) Whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death or whether a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found to exist.

2. Statutory aggravating circumstnaces shall be limited to the following:

(1) The offense was committed by a person with a prior record of conviction for capital murder, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The offense was committed while the offender was engaged in the commission of another capital murder;

(3) The offender by his act of capital murder knowingly created a grat risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of capital murder

for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The capital murder was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, elected official or former elected official during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit capital murder or committed capital murder as an agent or employee of another person;

(7) The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;

(8) The capital murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duty;

(9) The capital murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;

(10) The capital murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

3. Statutory mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age of the defendant at the time of the crime.

4. The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt.

5. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

California Penal Code §190.2-Death penalty or life imprisonment without parole; special circumstances

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

Florida Statute Ann. §921.141-Recommendation to mercy; procedure when persons convicted of capital felony

(5) Aggravating circumstances.-Aggravating circumstances shall be limited to the following:

(c) The defendant knowingly created a great risk of death to many persons.

(h) The capital felony was especially heinous, atrocious, or cruel.

Georgia Code Ann. §27-2534.1-Mitigating and aggravating circumstances; death penalty

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instaructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

Louisiana Revised Statute 14:30.1-Second degree murder

Second degree murder is:

B. The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

MISSOURI
SUPREME COURT RULES

Rule 28.02(e) Violation of Rule-Effect. Giving or failing to give an instruction or verdict form in violation of this Rule or any applicable Notes on Use shall constitute error, its prejudicial effect to be judicially determined.

Rule 28.02(f) Procedure for Marking Instructions. At the close of the evidence the court shall call a conference of counsel for the purpose of considering instructions and verdict forms requested by counsel as well as those which under the Rules the court proposes to give, whether requested or not. MAI-CR 2.01, 2.02, and 2.03 and all other instructions to be given to the jury at the close of all the evidence shall be numbered consecutively and in such order as the court shall determine unless otherwise instructed in approved Notes on Use.

All original written requests for instructions and verdict forms which are requested but refused shall be so marked by the court, identified alphabetically, and filed and shall be kept as a part of the record of the case. The court shall dictate into the record which party requested each instruction and verdict form given or refused and which instructions and verdict forms were given on the court's own motion.

Whether requested or not, the court shall see that a set of all necessary verdict forms is ready for submission to the jury.

The original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation and shall be returned to the court and filed at the conclusion of the jury's deliberation.